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APPENDIX TO BRIEF FOR APPELLANTS

In the
UNITED STATES COURT OF APPEALS
for the Fourth Circuit

No. 7418.

HENRY THOMAS HAILE, JR., individually, and as Administrator of the Estate of AGNES LEWIS HAILE, Deceased; MELVIN THOMAS HAILE, a minor, suing by next friend and father, Henry Thomas Haile, Jr.; CAROLYN DARLENE HAILE, a minor, suing by next friend and father, Henry Thomas Haile, Jr.; ORA ELLEN SMITH; MRS. GERTRUDE L. HAILE; and HENRY THOMAS HAILE,

Appellants,

versus

OSLEY BIRD SAUNOOKE; BERTHA SAUNOOKE; THE EASTERN BAND OF CHEROKEE INDIANS, a corporation; and the UNITED STATES, in its capacity as a government and also as trustee for and guardian of the Eastern Band of Cherokee Indians and the individual members thereof,

Appellees.

FOLTS, FRAMMER, BISHOP & THOMAS
610 James Building
Chattanooga, Tennessee
UZZELL AND DU'MONT
Jackson Building
Asheville, North Carolina
O. L. ANDERSON
Murphy, North Carolina
Attorneys for Plaintiffs

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for the Fourth Circuit

No. 7418.

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versus

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Appellees.

APPENDIX TO BRIEF FOR APPELLANTS

COMPLAINT

I

Henry Thomas Haile, Jr., who is a citizen and resident of Hamilton County, Tennessee, individually and as administrator of the estate of his deceased wife, Agnes Lewis Haile, at the time of her death also a resident of Hamilton County, Tennessee; Melvin Thomas Haile, a minor, age fourteen, a resident of Hamilton County, suing by next friend and father, Henry Thomas Haile, Jr.; Carolyn Darlene Haile, a minor, age six, a resident of Hamilton County, Tennessee, suing by next friend and father, Henry Thomas Haile, Jr.; Mrs. Gertrude L. Haile, a resident of Hamilton County, Tennessee; Henry Thomas Haile, a resident of Hamilton County, Tennessee; and Ora Ellen Smith, a resident of Hamilton County, Tennessee; as Plaintiffs, sue Osley Bird Saunooke, who is a citizen and resident of Jackson County, North Carolina; Bertha Saunooke, wife of Osley Bird Saunooke, and also a citizen and resident of Jackson County, North Carolina; the Eastern Band of Cherokee Indians, a corporation incorporated under the laws of, and with a charter from the State of North Carolina, and doing business in Jackson County, North Carolina; and the United States, in its capacity as government and also in its capacity as trustee for and guardian of the Eastern Band of the Cherokee Indians and the individual members thereof.

II

The ground upon which jurisdiction of the Court depends insofar as Osley Bird Saunooke, Bertha Saunooke, and the Eastern Band of Cherokee Indians are concerned is diversity of citizenship between the parties.

62 Stat. 930; 28 USC 1332

III

The grounds upon which the jurisdiction of the Court depends insofar as the United States is concerned are contained in U.S.C., Title 28, Sec. 1346(b).

60 Stat § 43 c. 753 as amended

IV

The amount in controversy as to each plaintiff exceeds Three Thousand Dollars ($3,000.00) exclusive of interest and costs.

V

On or about July 3, 1955, plaintiffs were severely injured when a swinging bridge, upon which they were walking, fell and threw them onto the rocks in a stream below, in one disastrous moment turning their family weekend vacation into a nightmare horror which saw the death of Agnes Lewis Haile, and the serious injury of all the plaintiffs.

VI

The bridge upon which this tragedy occurred was located in Jackson County, North Carolina, a short distance north of Cherokee. It led from the main highway across a stream to a tourist attraction owned and operated by the defendant, Osley Bird Saunooke, Chief of the Eastern Band of Cherokee Indians, and Bertha Saunooke, and was the principal means of access to this place of business. Extensive advertising by the Eastern Band of Cherokee Indians attracted thousands of tourists to this area daily, and signs erected by Chief Saunooke and his wife invited the public to use

the bridge and visit the premises operated by these defendants.

VII

The bridge was originally constructed by the United States, at the request of and for the benefit of the defendant, the Eastern Band of Cherokee Indians, and the defendants, Osley Bird Saunooke, and wife, utilized the bridge for commercial purposes as the principal means of access to their place of business, and said bridge was under the exclusive care and control of the defendants.

VIII

The defendants, Osley Bird Saunooke and wife, were guilty of negligence which proximately caused or contributed to the accident aforesaid in one or more of the following respects:

(1) In utilizing this bridge as the access to their tourist attraction when they knew, or in the exercise of ordinary care should have known, that it was unsafe;

(2) In failing to make adequate inspections of said bridge, which would have disclosed the imminent peril;

(3) In failing to make proper repairs to said bridge so as to cure the defects therein;

(4) In failing to properly control the flow of pedestrians onto the bridge so as to limit the load thereon from exceeding safe limits;

(5) In failing to post and keep posted signs warning the public of the danger;

(6) After they realized, on the day of the accident aforesaid, either themselves or through their agents and servants, that the bridge was in imminent danger of collapse, in failing to take any steps to avert the danger.

(7) In failing to provide a safe means of ingress and egress for those invited to their place of business.

IX

The Eastern Band of Cherokee Indians was beneficial owner of the land upon which the bridge was situated and had full knowledge or was chargeable with knowledge of the unsafe condition of the bridge, the use to which the bridge was being put, and of the danger to the tourists attracted there. By virtue of its charter of incorporation, as amended from time to time, this corporate defendant was charged with the duty of directing the management, control, and use of this property. Osley Bird Saunooke and wife operated their concession only by virtue of a revocable permit from this corporation defendant, which had the right and duty to require that such operation be conducted in such a manner as to insure the safety of the thousands of tourists attracted to the area by the advertisements and lures of this corporate defendant. The Eastern Band of Cherokee Indians had developed the entire area surrounding the scene of the accident into a vast commercial tourist attraction, to which it solicited travelers for the monetary gain of this corporate defendant as well as that of its individual members. By Tribal custom, the Band has the right to control the operations of the various individual members of the Band, including Osley Bird Saunooke and wife, and this right carried a corresponding duty toward the invited public.

X

The defendant, Eastern Band of Cherokee Indians, was guilty of negligence which proximately caused or contributed to the accident aforesaid in one or more of the following respects:

(1) In failing to take any steps to correct the dangerous conditions created through the negligence of Osley Bird Saunooke and wife, as set forth above, of which the Band knew or in the exercise of ordinary care should have known;

(2) In allowing the original construction of the bridge to be done in a negligent manner so as to render it unsafe;

(3) In failing to make adequate inspections of the bridge, which would have disclosed the imminent peril;

(4) In failing to make proper repairs to said bridge so as to cure the defects therein;

(5) In failing to properly control the flow of pedestrians onto the bridge so as to limit the load thereon from exceeding safe limits;

(6) In failing to revoke the permit allowing Osley Bird Saunooke and wife to operate their concession after it knew or in the exercise of ordinary care should have known of the negligent manner of their operation;

(7) In failing to post, and keep posted, signs to warn the public of the danger;

(8) In permitting the bridge, which was the property of the corporate defendant, to be used for a pur-

pose for which it was not constructed and for which it was unsafe and dangerous;

(9) In failing to use reasonable care and caution for the protection of the plaintiffs in the use of the bridge.

XI

The United States had and now has legal title to the land upon which the bridge was erected and held this title as trustee for the Eastern Band of Cherokee Indians. Also, the United States has been and is guardian for the Eastern Band of Cherokee Indians and the individual members thereof, including Osley Bird Saunooke and wife. The United States had placed a superintendent in the employ of the United States, near Cherokee, North Carolina, whose office was but a short distance from the scene of this accident, and it was made his duty, by Acts of Congress, regulations of the Department of the Interior, and decisions of the United States Courts, to supervise and control the Indian affairs, which included the supervision and control of this particular piece of property where the accident occurred. Particular reference is made to *U.S.C.*, Title 25, Sec. 31; *U.S.C.*, Title 25, Sec. 67; and the 1950 Reorganization Plan No. 3, effective May 24, 1950, 15 FR 3174, 64 Stat. 1262 (see USCA, Title 5, Sec. 481); U.S.C., Title 25, Sec. 306a; as well as general references to all the provisions of Title 25, U.S.C., as imposing duties upon the United States with reference to the ownership, control, and supervision of Indians' land and affairs. The United States, through its agents, failed to properly supervise and control Osley Bird Saunooke and wife, Bertha Saunooke, and the Eastern Band of Cherokee Indians, with regard to their inspection, maintenance, and repairs of this bridge, and

also with regard to their posting of warning signs and control of the flow of traffic on said bridge, and this failure upon the part of the United States proximately caused or contributed to the accident aforesaid. In addition, the United States itself failed to make proper construction, inspections, maintenance, and repairs of said bridge, or to control the flow of traffic thereon, or to post signs warning of the danger. The United States permitted the bridge to be used for a purpose which rendered it inadequate, unsafe, and dangerous, and all of these omissions also proximately caused or contributed to the accident.

FIRST COUNT

The plaintiff, Henry Thomas Haile, Jr., incorporates herein by reference Paragraphs I through XI, above.

II

As a result of the accident, the plaintiff, Henry Thomas Haile, Jr., was thrown with great violence onto the rocks in the stream below the bridge. He was knocked unconscious, taken to the Swain County Hospital, Inc., at Bryson City, North Carolina, and hospitalized for one week. In addition to numerous bruises all over his body and extreme shock caused by the accident and tragedy, he sustained a crushed extensive fracture of the right shoulder blade, lacerations about the head, and contusion of the right kidney. Plaintiff incurred heavy expenses, not only for his own medical treatment, but also for his two minor children, who were injured in the same accident, and for the funeral expenses of his wife, who was killed in the accident, and of whose companionship and services plaintiff has been thereby deprived.

In addition, since the accident, plaintiff has been unable to operate his restaurant at Daisy, Tennessee, as a result of his injuries, and has sustained loss of profits thereby. He has been incapacitated to work, and his injuries will probably result in permanent disability, the extent of which can not be determined fully as of now. All to his great damage in the sum of Forty-five Thousand Dollars ($45,000.00). That the acts of negligence on the part of the defendants, other than the United States, were wilful and wanton, as hereinafter alleged, and for said reason plaintiff should recover an additional Forty-five Thousand Dollars ($45,000.00).

SECOND COUNT

I

The plaintiff, Henry Thomas Haile, Jr., administrator of the estate of Agnes Lewis Haile, deceased, incorporates herein by reference Paragraphs I through XI, above.

II

Agnes Lewis Haile, wife of Henry Thomas Haile, Jr., died as a result of the injuries she received in this accident. Plaintiff has qualified as administrator of her estate, a certified copy of his letters of administration being attached hereto as Exhibit "A".

III

Plaintiff, as administrator, therefore, sues for her funeral expenses, for the pain and suffering she suffered prior to her death, and for the loss of her life, all to his great damage

in the sum of Thirty-five Thousand Dollars ($35,000.00). That the acts of negligence on the part of the defendants, other than the United States, were wilful and wanton, as hereinafter alleged, and for said reason plaintiff should recover an additional Thirty-five Thousand Dollars ($35,000.00).

THIRD COUNT

I

The plaintiff, Mrs. Gertrude L. Haile, incorporates herein by reference Paragraphs I through XI, above.

II

As a result of the accident, the plaintiff, Mrs. Gertrude L. Haile, age sixty-one (61), was thrown with great violence onto the rocks in the stream below the bridge. She was rendered unconscious for the better part of two days and was taken to Swain County Hospital, Inc., where she remained for twenty (20) days. She suffered numerous bruises and abrasions about her entire body and upon admission to the hospital was suffering such severe shock she had to receive intravenous fluids and blood. In addition, she sustained an acute, complete, severe, segmental fracture of the lower left humerus (which is the upper bone of the arm), and an acute, complete, severe compression fracture of her third lumbar vertebra. She had a cast on her arm and another about her body when she was removed from the hospital to her home by ambulance. She was subsequently placed in Memorial Hospital, at Chattanooga, Tennessee, for nine (9) days, where an operation was performed on her arm in the nature of an open reduction and dual Rush

nail fixation, at which time compression of the radial nerve was relieved by surgical intervention. Plaintiff will have to undergo extensive and plainful rehabilitation treatment and will be seriously and permanently disabled to an extent not now determined, all to her great damage in the sum of Forty-five Thousand Dollars ($45,000.00). That the acts of negligence on the part of the defendants, other than the United States were wilful and wanton, as hereinafter alleged, and for said reason, plaintiff should recover an additional Forty-five Thousand Dollars ($45,000.00).

FOURTH COUNT

I

The plaintiff, Henry Thomas Haile, incorporates herein by reference Paragraphs I through XI, above.

II

As a result of the injuries sustained by his wife, Gertrude L. Haile, the plaintiff, Henry Thomas Haile, has expended and become liable for large sums for medical treatment and has lost, and will continue to lose the companionship and services of his wife, all to his great damage in the amount of Three Thousand Dollars ($3,000.00). That the acts of negligence on the part of the defendants, other than the United States were wilful and wanton, as hereinafter alleged, and for said reason, plaintiff should recover an additional Three Thousand Dollars ($3,000.00).

FIFTH COUNT

I

The plaintiff, Ora Ellen Smith, incorporates herein by reference Paragraphs I through XI above.

II

As a result of the accident, the plaintiff, Ora Ellen Smith, age 65, was thrown with great violence onto the rocks in the stream below the bridge. She was hospitalized at the Swain County Hospital, Inc. for twenty (20) days. In addition to numerous bruises and abrasions about her entire body and a state of shock as a result of the accident, she also sustained a severely crushed fracture of the neck of the right humerus (upper bone of the arm), with resulting displacement of bony fragments. She also sustained severe lacerations of the scalp requiring many stitches, severe contusions of chest and back, fractures of her 5th and 8th right ribs, complicated by pleural reaction over the right apex and extending down to the 2nd rib. The plaintiff has incurred and will continue to incur heavy medical expenses and will have to undergo extensive and painful rehabilitation treatment. Plaintiff will sustain permanent disability to an extent not yet determined, all to her great damage in the sum of Twenty-five Thousand Dollars ($25,000.00). That the acts of negligence on the part of the defendants, other than the United States, were wilful and wanton, as hereinafter alleged, and for said reason plaintiff should recover an additional Twenty-five Thousand Dollars ($25,000.00).

SIXTH COUNT

I

The plaintiff, Melvin Thomas Haile, suing by next friend and father, Henry Thomas Haile, Jr., incorporates herein by reference Paragraphs I through XI, above.

II

As a result of the accident, the plaintiff, Melvin Thomas Haile, was thrown with great violence onto the rocks in the stream below the bridge. He was hospitalized at Swain County Hospital, Inc., for two (2) days. He sustained bruises and abrasions over his entire body, shock which was aggravated by the death of his mother and injury to other members of his family, and a severe laceration of his head, all to his great damage in the amount of Four Thousand Seven Hundred Fifty Dollars ($4,750.00). That the acts of negligence on the part of the defendants, other than the United States, were wilful and wanton, as hereinafter alleged, and for said reason, plaintiff should recover an additional Four Thousand Seven Hundred Fifty Dollars ($4,750.00).

SEVENTH COUNT

I

The plaintiff, Carolyn Darlene Haile, suing by next friend and father, Henry Thomas Haile, Jr., incorporates by reference Paragraphs I through XI, above.

II

As a result of the accident, the plaintiff, Carolyn Darlene Haile, was thrown with great violence onto the rocks in the stream below the bridge. She was hospitalized at the Swain County Hospital, Inc., for five (5) days. She sustained contusions, bruises and abrasions over her entire body, shock which was aggravated by the death of her mother, and injury to the other members of her family, severe abrasions of the chin, nose, and forehead, and hematoma of her leg, all to her great damage in the sum of Four

Thousand Seven Hundred Fifty Dollars ($4,750.00). That the acts of negligence on the part of the defendants, other than the United States, were wilful and wanton as hereinafter alleged, and for said reason, plaintiff should recover an additional Four Thousand Seven Hundred Fifty Dollars ($4,750.00).

EIGHTH COUNT

I

Plaintiffs charge that the acts and omissions of the defendants, Osley Bird Saunooke, Bertha Saunooke, and the Eastern Band of Cherokee Indians, as set forth hereinabove, (the allegations of Paragraphs I through XI being incorporated herein by reference) amounted to such gross negligence and wilful and wanton recklessness as to charge those two defendants with punitive as well as compensatory damages.

WHEREFORE, plaintiffs demand judgments against the defendants for the sum of Three Hundred Twenty-Five Thousand Dollars ($325,000.00) and demand a jury to try the issues when joined.

/s/ FOLTS, FRAMMER, BISHOP & THOMAS
610 James Building
Chattanooga, Tennessee

/s/ UZZELL AND DUMONT
Jackson Building
Asheville, North Carolina

/s/ O. L. ANDERSON
Murphy, North Carolina

Attorneys for Plaintiffs

EXTENSION OF TIME TO ANSWER

Upon a showing by the United States Attorney that the investigation being conducted by the United States in this cause has not been completed and that additional time is required before pleadings can be filed, it is

ORDERED that the United States be and it is hereby granted an extension of time within which to answer or file other pleadings in this cause for a period of sixty days or up to and including the 4th day of May, 1956.

This the 28 day of February, 1956.

/s/ WILSON WARLICK
United States District Judge

ORDER

For good cause shown, the Defendant, The Eastern Band of Cherokee Indians, is hereby allowed an additional sixty (60) days, to and including May 4, 1956, within which to answer or otherwise plead in the above entitled action.

THIS day of March, 1956.

/s/ WILSON WARLICK
United States District Judge

ANSWER OF OSLEY BIRD SAUNOOKE and wife, BERTHA SAUNOOKE

Osley Bird Saunooke and wife, Bertha Saunooke, answering the complaint of the plaintiffs in the above entitled cause say:

1.

That these answering defendants Osley Bird Saunooke and wife, Bertha Saunooke, admit that they are citizens and residents of Swain County, North Carolina. That as to the other averments of plaintiffs in paragraph one, these defendants do not have sufficient information or knowledge to form a belief.

2.

These defendants do not deny the averments set out in paragraph two of the complaint.

3.

The averments of paragraph three of the complaint do not affect these defendants.

4.

The plaintiffs are demanding by their complaint an amount in excess of Three Thousand ($3,000.00) each. These defendants specifically deny that they are indebted to any of the plaintiffs.

5.

These defendants admit that a swinging bridge identified in the complaint fell on or about July 3, 1955. These defendants are without knowledge or information sufficient to form a belief as to the truth of the other averments of paragraph five of the complaint.

6.

These defendants admit that the bridge which fell was located in Swain County, North Carolina, and that these defendants operated a business adjacent to one end of the bridge. Defendants specifically deny that the swinging bridge was the principal means of access to their business, or that they erected signs inviting the public to use the bridge. Such other averments of paragraph six of the complaint as set forth, do not affect these defendants.

7.

These defendants specifically deny that they utilized the bridge for commercial purposes, as the principal means of arriving to their place of business, and that said bridge was under their care and control, and deny that the bridge was originally constructed at their request or for their benefit.

8.

That the averments of paragraph eight are denied.

9.

Those averments of paragraph nine which pertain to these defendants are denied.

10.

That the averments of paragraph ten of the complaint do not pertain to these defendants.

11.

The averments of paragraph eleven of the complaint do not pertain to these defendants.

12.

These defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of Counts First through Eight of the complaint, except they specifically deny any negligence, and particularly deny any wilful or wanton negligence.

13.

The complaint fails to state a claim against these defendants upon which relief can be granted.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs had knowledge of and assumed risks incidental to their going upon the swinging bridge, and the injuries alleged to have been sustained arose from and were caused by said risks.

SECOND AFFIRMATIVE DEFENSE

Such injuries as were sustained by plaintiffs as set forth

in the complaint were caused in whole or in part, or were contributed to by their own negligence.

THIRD AFFIRMATIVE DEFENSE

While these defendants deny any negligence, if such negligence should be found, plaintiffs were guilty of contributory negligence, which is pleaded in bar of recover.

/s/ STYLES & STYLES

Attorneys for Osley Bird Saunooke and wife, Bertha Saunooke

Legal Building, Asheville, N. C.

This 2nd day of March, 1956.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA

Civil Action
No. 1544

HENRY THOMAS HAILE, JR., individually and as Administrator of the Estate of AGNES LEWIS HAILE, Deceased; MELVIN THOMAS HAILE, a minor suing by next friend and father, HENRY THOMAS HAILE, JR., CAROLYN DARLENE

HAILE, a minor suing by next friend and father, HENRY THOMAS HAILE, JR., ORA ELLEN SMITH, MRS. GERTRUDE L. HAILE; and HENRY THOMAS HAILE,
Plaintiffs,

v.

OSLEY BIRD SAUNOOKE; BERTHA SAUNOOKE; THE EASTERN BAND OF CHEROKEE INDIANS, A Corporation; and the UNITED STATES, in its capacity as a government and also as trustee for and guardian of the Eastern Band of Cherokee Indians and the individual members thereof,
Defendants.

MOTION TO DISMISS AS TO THE UNITED STATES IN THE CAPACITY OF TRUSTEE FOR AND GUARDIAN OF THE EASTERN BAND OF CHEROKEE INDIANS.

The United States of America, by James M. Baley, Jr., United States Attorney, moves the Court to dismiss the complaint against the United States in the capacity of trustee for and guardian of the Eastern Band of Cherokee Indians for the reason that the United States has not consented to be sued in such capacity; and, therefore, this Court is without jurisdiction to grant relief sought by the complaint with respect to any and all moneys or other property, real or personal, held by the United States in trust for the Eastern Band of Cherokee Indians.

The Court is respectfully referred to the following affidavits, which are filed in support of this motion:

(1) the affidavit of Glenn L. Emmons, United States Commissioner of Indian Affairs;

(2) the affidavit of D. Otis Beasley, Administrative Assistant Secretary, United States Department of the Interior; and

(3) the affidavit of W. Barton Greenwood, Assistant Commissioner [Administration] Bureau of Indian Affairs, United States Department of the Interior.

The Court is further respectfully referred to the memorandum of points and authorities also filed in support of this motion.

WHEREFORE, the United States of America moves the Court to issue its order forthwith dismissing the complaint as to the United States in the capacity of trustee for and guardian of the Eastern Band of Cherokee Indians.

/s/ JAMES M. BALEY, JR.
United States Attorney

/s/ HUGH E. MONTEITH
Assistant United States Attorney

Of Counsel:

GEORGE COCHRAN DOUB
Assistant Attorney General

BONNELL PHILLIPS
JOHN G. ROBERTS
Attorneys, Department of Justice

THEODORE H. HAAS
ASSISTANT SOLICITOR
NORMAN A. GRAY
Attorneys
Department of the Interior

(Caption Omitted)

NON-SUIT
ON BEHALF OF HENRY THOMAS HAILE, JR., ADM. OF THE ESTATE OF AGNES LEWIS HAILE, DECEASED

THIS CAUSE coming on for hearing before the undersigned United States District Judge upon motion of the plaintiff, Henry Thomas Haile, Jr., Administrator of the Estate of Agnes Lewis Haile, Deceased, to dismiss this action as in the case of voluntary non-suit;

IT IS, THEREFORE, ORDERED and ADJUDGED that this action in so far as it relates to the case by the Administrator of Agnes Lewis Haile, deceased, be and the same is hereby dismissed without prejudice as in the case of voluntary non-suit.

This the 12 day of November, 1956.

/s/ WILSON WARLICK
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
ASHEVILLE DIVISION

Civil Action
No. 1544

HENRY THOMAS HAILE, JR.,
Individually, et al
Plaintiffs,

vs.

OSLEY BIRD SAUNOOKE, et al
Defendants

MOTION

TO: The United States District Judge for the Western District of North Carolina

NOW COME the plaintiffs and all of them, and respectfully show to the court:

1. That this is a civil action for damages on account of negligence, instituted by summons dated January 3, 1956, and filed January 10, 1956;

2. That, thereafter, the defendant, United States of

America, secured an order dated February 28, 1956, extending the time within which to answer to and including May 4, 1956.

3. That, thereafter, a motion was filed, captioned as follows: "Motion to Dismiss as to the United States in the Capacity of Trustee for and Guardian of the Eastern Band of Cherokee Indians."

4. That the motion by the United States as guardian and trustee was granted on the 10th day of December, 1956, and that the plaintiffs duly entered of record their exception to said dismissal.

5. That no pleadings have been filed by the United States of America, and that no extension of time beyond May 4, 1956, has been granted by the court, and that the time for answering by the United States of America has now expired.

6. That no motion by the United States of America has been made pursuant to Rule 6(b) of the Rules of Civil Procedure for an enlargement of the time within which to answer.

WHEREFORE, the plaintiffs respectfully move the court, pursuant to Rule 55, Rules of Civil Procedure:

1. For an order directing that this case be set for hearing in order that the court might hear evidence of plaintiffs establishing their right to relief.

This the 11th day of January, 1957.

/s/ UZZELL AND DUMONT
Counsel for Plaintiffs

(Caption Omitted)

ORDER

This cause coming on to be heard and being heard before the undersigned United States District Judge upon the motion of the defendant, the United States, acting in its sovereign capacity as a government and in its capacity as Trustee for and Guardian of the Eastern Band of Cherokee Indians and the individual members thereof, to dismiss this action as to the United States in its capacity as Trustee for and Guardian of the Eastern Band of Cherokee Indians and the individual members thereof, the Court, after hearing arguments of counsel for the plaintiffs and the defendant and after considering the complaint of the plaintiffs, the motion of the defendant, the affidavits referred to in said motion (being the affidavits of Glenn L. Emmons, United States Commissioner of Indian Affairs, D. Otis Beasley, Administrative Assistant Secretary of the United States Department of the Interior, and W. Barton Greenwood, Assistant Commissioner [Administration] Bureau of Indian Affairs, United States Department of the Interior), makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. That by this action the plaintiffs seek to recover damages for alleged injuries sustained by them resulting from the collapse on July 3, 1955 of a certain bridge across the Oconalufty River located on the Qualla Boundary of the Eastern Band of Cherokee Indians, Swain County, North Carolina; that the legal title to said Qualla Boundary upon which said bridge was located was on said date, and still is, vested in the United States in trust for the Eastern Band of Cherokee Indians by virtue of a deed of conveyance executed by the Eastern Band of Cherokee Indians to the United States, which deed bears date of July 21, 1925 and was executed by the Eastern Band of Cherokee Indians and accepted by the United States under the provisions of an Act of Congress passed on June 4, 1924 (43 STAT. 376).

2. That the Congress of the United States and the Executive Branch of the United States Government have continuously recognized the Eastern Band of Cherokee Indians as an Indian Tribe; that, specifically, by an Act of July 27, 1868 (15 STAT. 228) the Congress of the United States directed the Secretary of the Interior to have a new roll of the North Carolina Cherokees prepared, and Section 3 of said Act provides as follows:

> "And be it further enacted that hereafter the Secretary of the Interior shall cause the Commissioner of Indian Affairs to take the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians."

That the Indians referred to in said Act are the Eastern

Band of Cherokee Indians, named as one of the defendants herein.

3. That at the time of the institution of this action the Eastern Band of Cherokee Indians was, and still is, an Indian Tribe.

4. That the Congress of the United States has not given its consent for the plaintiffs to institute and maintain this action either against the Eastern Band of Cherokee Indians and the individual members thereof or against the United States in its capacity as Trustee for and Guardian of the Eastern Band of Cherokee Indians and the individual members thereof.

CONCLUSIONS OF LAW

That the Eastern Band of Cherokee Indians and the United States in its capacity as Trustee for and Guardian of the Eastern Band of Cherokee Indians and the individual members thereof, are clothed with sovereign immunity from suit and cannot be sued without consent duly given by the Congress of the United States; that the Federal Tort Claims Act (28 U.S.C. 1346(b)) does not constitute a waiver of sovereign immunity from suit with respect to the United States in its capacity as Trustee for and Guardian of the Eastern Band of Cherokee Indians and the individual members thereof, and the United States has not consented to be sued in its capacity as Trustee for and Guardian of the Eastern Band of Cherokee Indians and the individual members thereof.

It is, therefore, ORDERED that the motion to dismiss said action against the United States in its capacity as Trustee for and Guardian of the Eastern Band of Cherokee

Indians and the individual members thereof be and the same is hereby allowed, and said action is hereby dismissed as to the United States in its capacity as Trustee for and Guardian of the Eastern Band of Cherokee Indians and the individual members thereof; and it is further

ORDERED that the United States in its capacity as a Government be and it is hereby granted sixty (60) days from the date of this order within which to file answer or otherwise plead to the complaint of the plaintiffs.

This the 23 day of January, 1957.

/s/ WILSON WARLICK
United States District Judge

(Caption Omitted)

ORDER

This cause, coming on to be heard before the undersigned United States District Judge upon the motion of the Defendant, the Eastern Band of Cherokee Indians, to dismiss this action as to said Defendant, and being heard, the Court, after hearing argument of Counsel for the Plaintiffs and the said Defendant, and after considering the Complaint of the Plaintiffs, the motion of the Defendant, and the Affidavits referred to in said motion, being the Affidavits of Glenn L. Emmons, United States Commissioner of Indian Affairs, the Affidavit of W. Barton Greenwood, Assistant Commissioner of the Bureau of Indian Affairs, and the Affidavit of D. Otis Beasley, Administrative Assistant Secretary of the Department of the Interior, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

(1) That by this action the Plaintiffs seek recovery of damages from the Defendants for injuries to the Plaintiffs resulting from the collapse on July 3, 1955, of a certain bridge across the Oconalufty River, located on the Qualla Boundary of the Eastern Band of Cherokee Indians in Swain County, North Carolina. The legal title to said Qualla Boundary upon which said bridge was located was on said date, and still is, vested in the United States in trust for the Eastern Band of Cherokee Indians by virtue of a deed of conveyance executed by the Eastern Band of Cherokee Indians to the United States, which deed bears date July 21, 1925, and was executed by the Indians and accepted by the United States under the provisions of Act of Congress passed on June 4, 1924 (43 STAT. 376).

(2) That prior to 1835 the Cherokee Indian Tribe lived in large areas of what are now the States of Tennessee, North Carolina, South Carolina, Alabama and Georgia. By successive treaties beginning with the Treaty of Hopewell in 1785 (7 STAT. 18) and ending with the Treaty of New Echota in 1835 (7 STAT. 478) the possessory right of the Cherokee Tribe over lands in North Carolina was gradually extinguished and all such land was made subject to grant by North Carolina. By the Treaty of New Echota the Tribe agreed to remove from North Carolina westward beyond the Mississippi in consideration of a payment of money by the United States and a grant of land beyond the Mississippi. A large number of Cherokees were moved as a result of the Treaty of New Echota by the United States Government to new lands West of the Mississippi. However, a number of the North Carolina Cherokees were permitted to remain in North Carolina in accordance with Article 12

of the Treaty of New Echota and others hid in the mountains of Western North Carolina and were not moved. By treaty with the Cherokee Indians in 1846 (9 STAT. 871) the United States recognized certain rights in the Cherokees then residing East of the Mississippi River as follows:

> "Article 10. It is expressly agreed that nothing in the foregoing treaty contained shall be so construed as in any manner to take away or abridge any rights or claims which the Cherokees now residing in states East of the Mississippi River had, or may have, under the Treaty of 1835 and the supplement thereto."

The Congress of the United States more specifically recognized the rights of the Cherokees residing in North Carolina by Act of July 29, 1848 (9 STAT. 264), which made provision for taking a census of the North Carolina Cherokees and the payment of certain per capita payments. In accordance with this Act the first authentic role of the Eastern Cherokees residing in North Carolina subsequent to the Treaty of 1835 was made and the number entitled to enrolment found to be two thousand one hundred thirty-three. Subsequently, by Act of July 27, 1868 (15 STAT. 228) the Congress of the United States directed the Secretary of the Interior to have a new role of the North Carolina Cherokees prepared and Section 3 of this Act provided as follows:

> "And be it further enacted, that hereafter the Secretary of the Interior shall cause the Commissioner of Indian Affairs to take the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians."

Following enactment of this Act the Commissioner of Indian Affairs on November 7, 1868, by letter, advised the Cherokee Indians in North Carolina to organize themselves into a tribal capacity and elect their own officers, and the Eastern Cherokees shortly thereafter on December 9, 1868, at Cheoa, North Carolina, set forth a declaration establishing a simple form of tribal government. Subsequently and on October 13, 1875, at Cheoa Council Ground, the Eastern Band of Cherokee Indians approved a constitution known as the Welch Constitution, which provided for a Tribal Council and the number and qualifications of the members of the Council, a Principal Chief, a Vice Chief, other tribal officials, and the composition of the executive council, and specified that the annual council should be held on the first Monday in October. The Welch Constitution was in operation until the State of North Carolina passed Chapter 211 of the Private Laws of 1889 entitled "An Act incorporating the Eastern Band of Cherokee Indians, and for other purposes." This Act was subsequently amended by Chapter 166 of the Private Laws of 1895, Chapter 207 of the Private Laws of 1899, Chapter 128 of the Private Laws of 1931 and Chapter 39 of the Private Laws of 1933. The Eastern Band of Cherokee Indians has, as provided in the State Charter, elected a Principal Chief, a Vice Chief and a Tribal Council and these officials have directed the business and affairs of the Eastern Band of Cherokee Indians in accordance with tribal ordinances and resolutions adopted by the Tribal Council and approved by the United States Indian Office. By election held on December 20, 1934, the Eastern Band of Cherokee Indians voted by a vote of 700 affirmative votes to 101 negative votes to accept the provisions of the Indian Reorganization Act of June 18, 1934, (48 STAT. 984). On August 28, 1935, the Eastern Band of

Cherokee Indians voted 381 for and 484 against accepting a constitution and by-laws in accordance with Section 16 of that Act.

(3) That subsequent to the Act of July 27, 1868 (15 STAT. 228) the Congress of the United States has enacted many other Statutes relating specifically to the Eastern Band of Cherokee Indians and recognizing their status as an Indian Tribe. As provided in Section 3 of that Act, the Secretary of the Interior has caused the Commissioner of Indian Affairs to take the same supervisory charge of the Eastern Band of Cherokee Indians as of other tribes of Indians. Continuously since the enactment of the Act of July 3, 1868 (15 STAT. 228) until the present time, the Government of the United States, by successive Acts of the Congress of the United States, and by repeated actions of its Executive Branch, acting particularly through the Bureau of Indian Affairs, has recognized the Eastern Band of Cherokee Indians as an Indian Tribe in all respects exactly as other Indian Tribes. Consistently and continuously since that date the legislative and executive branches of the Federal Government have dealt with and exercised supervision over the Eastern Band of Cherokee Indians, in the same manner and to the same extent as over other Indian Tribes. The United States Government holds title to their lands and holds their funds in its treasury as trustee for these Indians. The United States Government maintains an Indian Agency at Cherokee, North Carolina, with a Superintendent in charge thereof under the Bureau of Indian Affairs. The Congress has appropriated substantial Federal funds to be available each year to the Cherokee Indian Agency to pay the costs of administration, education of the Indians, forestry, soil conservation, construction and

maintenance of roads and buildings and other purposes for the welfare of these Indians. These various programs for the fiscal year 1956 will cost approximately $650,000.00 in Federal funds. Through the Cherokee Indian Agency the United States Bureau of Indian Affairs has dealt with the Tribal Authorities of the Eastern Band of Cherokee Indians and has exercised supervisory control over their affairs in such matters as the management and conservation of their resources, the appointment of tribal attorneys, the safe-guarding of Indian lands, the granting of traders' licenses, the making of tribal membership roles, and other matters affecting the welfare of these Indians. Expenditures from the tribal funds of these Indians which are held in the United States Treasury in trust for their benefit are made only after the Tribal Council has adopted a budget for this purpose, which budget has been approved by the Superintendent of the Cherokee Indian Agency and the Bureau of Indian Affairs, submitted to the Federal Bureau of the Budget, and finally authorized by Act of Congress as part of the general budget of the President of the United States for operation of the Federal Government. By these and many other actions both the Congress of the United States and the Executive Branch of the Federal Government have over a long period of years and continuing to the present time dealt with and recognized the Eastern Band of Cherokee Indians as an Indian Tribe within the meaning of the Constitution and Laws of the United States.

(4) That the Congress of the United States has not passed any Act or otherwise taken any action giving its consent that this action may be brought against the Eastern Band of Cherokee Indians.

CONCLUSIONS OF LAW

(1) That the political departments of the Federal Government recognize the Defendant, the Eastern Band of Cherokee Indians, as constituting an Indian Tribe, and it is a rule of the Courts, in matters of this kind, to follow the action of the Congress and the Executive Departments whose duty it is to determine such affairs. Applying this principle, it has now been conclusively established by a long line of decisions of the Circuit Court of Appeals that the Defendant, the Eastern Band of Cherokee Indians, is an Indian Tribe within the meaning of the Federal Constitution and the Laws of the United States. *United States* vs. *Boyd*, 83 F. 547 (C.A. 4th, 1897); *United States* vs. *Wright*, 53 F. (2d) 301 (C.C.A. 4th, 1931); *United States* vs. *Colvard*, 89 F. (2d) 312 (C.C.A. 4th, 1937); *United States* vs. *7,405.3 acres of land in Macon, Clay and Swain Counties, North Carolina, et al*, 97 F. (2d) 417 (C.C.A. 4th, 1938); *Blair, Superintendent of the Cherokee Indian Agency* vs. *McAlhenny*, 123 F. (2d) 142 (C.C.A. 4th, 1941); *United States* vs. *Partin*, 132 F. (2d) 886 (C.C.A. 4th, 1943).

(2) That Chapter 211 of the Private Laws of North Carolina of 1889 entitled "An Act incorporating the Eastern Band of Cherokee Indians, and for other purposes," as subsequently amended by other Acts of the General Assembly of North Carolina, is operative only in so far as it does not conflict with the rights conferred upon the Eastern Band of Cherokee Indians by the Constitution and Laws of the United States and only in so far as it does not interfere with the supervisory control which the Federal Government exercises over this Indian Tribe. Since the Federal Government has plenary power and control over this Indian Tribe, the State of North Carolina is without power by Act

of its Legislature to authorize suit to be brought against the Defendant, the Eastern Band of Cherokee Indians, or in any other manner to interfere with Federal control over its affairs. *United States* vs. *Boyd*, 83 F. 547 (C.A. 4th, 1897); *United States* vs. *Wright*, 89 F. (2d) 312 (C.C.A. 4th, 1931).

(3) That the Congress of the United States can alone authorize a suit to be brought against an Indian Tribe and that the Defendant, the Eastern Band of Cherokee Indians, is exempt from suit without such congressional authorization. As was said by the Supreme Court of the United States in the case of *United States* vs. *United States Fidelity and Guaranty Co.*, 309 U. S. 506, 60 S. Ct. 653, 84 L. Ed. 894 (1940):

> "The public policy which exempted the dependent as well as the dominant sovereignties from suit without consent continues this immunity even after dissolution of the tribal government. These Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did."

See also *Thebo* vs. *Choctaw Tribe of Indians*, 66 Fed. Rep. 372 (C.A. 8th, 1895), and *Rollins* vs. *The Eastern Band of Cherokee Indians*, 87 N. C. 229 (1882).

(4) That since Congress has not given its consent that the Eastern Band of Cherokee Indians may be sued in this action, this action must be dismissed as to such Defendant.

IT IS NOW, THEREFORE, ORDERED AND AD-

JUDGED that this action be and the same is hereby dismissed as to the Defendant, the Eastern Band of Cherokee Indians.

THIS 25th day of January, 1957.

/s/ WILSON WARLICK
United States District Judge for the Western District of North Carolina

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(Caption Omitted)

STIPULATION

WHEREAS, there is now pending in the United States District Court for the Western District of North Carolina the following cases:

Mrs. Bessie Adcock v. *Osley Bird Saunooke, et al.*, Docket No. 1564

Robert Manuel Adcock et al. v. *Osley Bird Saunooke, et al.* Docket No. 1551

Herman Brown v. *United States of America, et al.* Docket No. 1601

Evelyn J. Fritts et al v. *Osley Bird Saunooke, et al.* Docket No. 1582

Jessie H. Glazier et al. v. *Osley Bird Saunooke, et al.* Docket No. 1633

William E. Greene, Administrator of the Estate of Ethel Owens Rainwater, deceased v. *Osley Bird Saunooke, et al.*, Docket No. 1584

William E. Greene, Administrator of the Estate of Agnes Lewis Haile, deceased v. *Osley Bird Saunooke, et al.* Docket No. 1634

Henry Thomas Haile, Jr. et al v. *Osley Bird Saunooke et al*, Docket No. 1544

John Lankford et al. v. *Osley Bird Saunooke et al.* Docket No. 1581

Sarah Little et al. v. *Osley Bird Saunooke et al.* Docket No. 1580

Mrs. Alice McMichen v. *Osley Bird Saunooke et al.* Docket No. 1571

Mrs. Verdene Priest v. *Osley Bird Saunooke et al.*, Docket No. 1583

Jimmy Rogers v. *United States of America et al.*, Docket No. 1602

William W. Smith v. *United States of America et al.* Docket No. 1600

Mary Alice Webb et al. v. *Osley Bird Saunooke et al.* Docket No. 1579

WHEREAS, all of said cases are for damages on account of the alleged negligence of the defendants relating to a swinging bridge at Cherokee, North Carolina, and

WHEREAS, motions to dismiss as to part of the defendants have been granted, and notices of appeal have been filed in all of said cases; and

WHEREAS, it is deemed advisable that an appeal should be prosecuted in only one of such cases; and that the decision of the Appellate Court in such case shall govern and be determinative of the question of the proper parties defendant;

NOW, THEREFORE, IT IS STIPULATED AND AGREED that an appeal shall be prosecuted in the case of Henry Thomas Haile, Jr. et al. v. Osley Bird Saunooke, et al., Docket No. 1544, and that the decision in said case by the Appellate Court shall govern and be determinative of the question of the proper parties defendant in all of the above enumerated cases.

This the 8 day of March, 1957.

/s/ JAMES M. BALEY, JR.
United States Attorney
Attorneys for the Eastern Band of Cherokee Indians, a corporation

/s/ UZZELL AND DUMONT
Attorneys for Plaintiffs.

(Caption Omitted)

CONSENT ORDER

Notice of appeal to the Fourth Circuit Court of Appeals from the judgment of this Court dismissing this action in so far as it relates to the Eastern Band of Cherokee In

dians and the United States as guardian of and trustee for the Eastern Band of Cherokee Indians and the individual members thereof, having been filed in the above entitled case and the following other cases arising out of the collapse of a swinging bridge at the Cherokee Indian Reservation, Cherokee, North Carolina:

Robert Manuel Adcock v. *Osley Bird Saunooke, et al.* Docket No. 1551

Mrs. Bessie Adcock v. *Osley Bird Saunooke, et al.* Docket No. 1564

Mrs. Alice McMichen v. *Osley Bird Saunooke, et al.* Docket No. 1571

Mary Alice Webb, et al v. *Osley Bird Saunooke, et al.* Docket No. 1579

Sarah Little, et ano. v. *Osley Bird Saunooke, et al.* Docket No. 1580

John Lankford, et al. v. *Osley Bird Saunooke, et al.* Docket No. 1581

Evelyn J. Fritts, et al. v. *Osley Bird Saunooke, et al.* Docket No. 1582

Mrs. Vardene Priest v. *Osley Bird Saunooke, et al.* Docket No. 1583

William E. Greene, Administrator of the Estate of Ethel Owens Rainwater, Deceased v. *Osley Bird Saunooke, et al.* Docket No. 1584

William W. Smith v. *United States of America, et al.* Docket No. 1600

Herman Brown v. *United States of America, et al.* Docket No. 1601

Jimmy Rogers v. *United States of America, et al.* Docket No. 1602

Jessie H. Glazier, et al. v. *Osley Bird Saunooke, et al.* Docket No. 1633

William E. Greene, Administrator of the Estate of Agnes Lewis Haile, deceased v. *Osley Bird Saunooke, et al.* Docket No. 1634

And the Court being advised, and so finding, that the decision rendered by the Appellate Court, whatever its ruling, may require modification or amendment of the pleadings in the line with a finding as to the proper parties defendant;

And it further appearing that this Court has granted an enlargement of time for sixty (60) days from January 23, 1957 in which the United States is permitted to answer or otherwise plead, and that said enlargement of time has not expired;

It is, therefore, in the discretion of this Court and by consent of all parties, ORDERED, ADJUDGED AND DECREED in this action and in all of the above referred to cases, that the United States as a sovereign power or in its capacity as guardian of and trustee for the Eastern Band of Cherokee Indians or the individual members thereof, shall not be required to answer or file other pleadings herein for a period of sixty (60) days from and after the receipt by the Clerk of the United States District Court for the Western District of North Carolina of the mandate of the Court of Appeals in the case of Henry Thomas Haile, Jr., et al v. Osley Bird Saunooke, et al., Civil No. 1544;

This agreement and order is made without prejudice to any points which may be raised on appeal in the said Haile case and said order shall not constitute a part of the record on appeal.

This the 9 day of March, 1957.

/s/ WILSON WARLICK
United States District Judge

WE CONSENT TO THE ABOVE ORDER:

_____

Attorneys for Plaintiffs

_____

Attorney for Eastern Band of Cherokee Indians

_____

United States Attorney

_____

(Caption Omitted)

ORDER

It appearing to the Court that more than one claim for relief is presented in this action and that this Court has entered a final order dismissing the case as to the United

States in its capacity as trustee for and guardian of the Eastern Band of Cherokee Indians and the individual members thereof, and a final order dismissing the action as to the Eastern Band of Cherokee Indians, Inc., a corporation; and it further appearing that the claims as to the United States of America in its sovereign capacity and against Osley Bird Saunooke and wife, Bertha Saunooke, have not been adjudicated; and it further appearing that an appeal has been taken by the plaintiffs from the order dismissing the action as to the Government in its trustee and guardianship capacity and as to the Eastern Band of Cherokee Indians, Inc., and that the ends of justice would require that the propriety of said orders of dismissal should be determined by the Circuit Court of Appeals and that there is no just reason for delaying in making said determination;

It is, therefore, ORDERED AND ADJUDGED that the claims of the plaintiffs as against the United States of America in its trustee and guardianship capacity of the Eastern Band of Cherokee Indians and the individual members thereof and the Eastern Band of Cherokee Indians, Inc., a corporation, be severed from said action for the purpose of appeal in order that an adjudication upon the orders of dismissal may be had, and the plaintiffs are permitted to appeal from the judgment entered upon said severed claims to the Circuit Court of Appeals for the Fourth Circuit; all pursuant to RULES OF CIVIL PROCEDURE 54(b).

This the 11 day of March, 1957.

/s/ WILSON WARLICK
United States District Judge